

**Wills, Trusts & Estates**

# Dependant denied support for misconduct: Support applications

By **Peter Neufeld**

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(June 1, 2020, 2:54 PM EDT) -- This three-part series addresses the question of whether misconduct by a dependant could disentitle that person to support that they might otherwise be entitled to receive. The answer to this requires a review of several acts, including the *Civil Remedies Act*, and this article will explore it and how other statutes and common law rules have been applied to try to disentitle beneficiaries to proceeds of life insurance and through intestacy.

## Civil Remedies Act

The provincial government has bolstered the "slayer rule" (a common law doctrine that bars individuals from benefiting from committing murder) by enacting the *Civil Remedies Act, 2001*, S.O. 2001, c. 28 (CRA). Section 3(1) of the CRA permits the Attorney General of Ontario to commence a proceeding in the Ontario Superior Court of Justice for an order that the proceeds of unlawful activity be forfeited to the province.

The slayer rule and the CRA provide for different uses of the returned funds. As noted in *Dhingra v. Dhingra Estate* 2012 ONCA 261, forfeiture under the slayer rule would have the funds returned to either a secondary beneficiary, if one is named, or to the beneficiaries of the deceased's estate. In contrast, under the CRA the proceeds are forfeited to the Crown, which potentially deprives everyone involved of the proceeds, including other beneficiaries. One exception to this is s. 6(3) of the CRA, which permits the forfeited funds to be distributed to dependants who suffered damages that would otherwise be able to commence an action against the person who caused the deceased's death, pursuant to Part V of the *Family Law Act*.

## Ex turpi causa non oritur actio

*Ex turpi causa non oritur actio* ("no right of action arises from a base cause") is a legal maxim that seeks to prevent litigants from benefiting from their illegal conduct. In other words, if one is engaged in illegal activity, one cannot sue another for damages that arose from the illegal activity. It is similar to the slayer rule, but arguably broader in scope.

The application of the ex turpi causa doctrine has been strictly limited in Canada, and the Supreme Court in *Hall v. Hebert* [1993] 2 S.C.R. 159 held that it should only be invoked sparingly, but that it may be used where permitting the plaintiff's claim would allow it to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. The court held that its use was not justified where the plaintiff's claim is for compensation for personal injuries sustained as a consequence of the negligence of the defendant.

The Supreme Court of Canada in *British Columbia v. Zastowny* 2008 SCC 4 synthesized the principles from *Hall v. Hebert* to determine when the ex turpi causa doctrine applies. The court in *Zastowny* noted the following:

- Application of the ex turpi causa doctrine in the tort context invalidates otherwise valid and enforceable actions in tort, and must therefore be based on a firm doctrinal foundation with

clear limits.

- The only justification for its application is the preservation of the integrity of the legal system, and limited to where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct or would permit the party to avoid a criminal penalty.
- The doctrine generally does not preclude an award of damages in tort because such awards tend to compensate the plaintiff rather than amount to "profit." The ex turpi causa doctrine is a defence in a tort action and is independent from determining whether a duty of care exists.
- As a defence, the defendant bears the onus of proving the illegal or immoral conduct that precludes the plaintiff's action.

### **Application for dependant support**

Whether and how the slayer rule and the CRA would apply to dependant support applications is unclear. In the case of a dependant support application, the funds have not been "forfeited." Rather, the dependant seeks to claim these funds from the estate. That being the case, similar public policy principles underlying the slayer rule and the CRA arguably apply to deny a spouse's entitlement to dependant support. As Justice Claire L'Heureux-Dubé noted in *Oldfield v. Transamerica Life Insurance Co. of Canada* 2002 SCC 22, the purpose of the slayer rule is to deny individuals from gaining from their own morally culpable conduct. Her finding is similar to the language used in *Lapierre v. Lapierre Estate* [2002] O.J. No. 1275, that the conduct referred to in s. 62(1)(r)(i) must "shock one's conscience."

One of the few dependant support applications where the dependant allegedly caused the deceased's death is *Romero v. Naglic Estate* [2009] O.J. No. 2299. In that case, the court considered the dependant's entitlement to interim support, despite allegations that he had murdered the deceased. The dependant was charged with murdering his common law spouse, but was ultimately acquitted, although a wrongful death action against the dependant was still pending. Despite this, the deceased spouse's estate took the position that, among other reasons, the dependant was not entitled to support because he had, in fact, killed his spouse.

The court granted the dependant's motion for interim support. In doing so, the court noted that while the estate trustee alleged that the dependant had, in fact, killed his wife, he was entitled to the full benefit of the "not guilty" verdict from the criminal proceeding on the motion for interim support, and ultimately the application would be heard alongside the wrongful death action. That application and wrongful death action do not appear to have been judicially determined.

It is also arguable that neither the ex turpi causa doctrine nor the slayer rule should bar a dependant from receiving financial support because they would not be said to "profit" from that support. Dependant's relief legislation is intended to be remedial (*Stevens v. Fisher* 2013 ONSC 2282). Section 58(1) of the *Succession Law Reform Act* states that the court may order dependant support "where the deceased has not made adequate provision for the proper support of the dependants." The factors enumerated in s. 62 of the SLRA do not consider the profits that the dependant should receive, but rather the dependant's current means and assets, their relationship with the deceased and their contributions to the deceased's career, welfare and property.

Hence, in a dependant support application, the court is not assessing whether the dependant is entitled to a profit, but whether the deceased is satisfying their legal and moral obligations to the dependant by providing adequate support in their will or through other beneficiary designations.

This is part two of a three-part series. Read part one: *Dependants denied support for misconduct: Death and the 'slayer rule'*.

*Peter Neufeld is a member of Wagner Sidlofsky LLP's estate and commercial litigation groups.*

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